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In The
Supreme Court of the United States

MARK ALBERT MALOOF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED FOR REVIEW

Whether Fed. R. Evid. 403, as applied by the district court and interpreted by the Fifth Circuit, can preclude cross-examination of the government's star witness and limit direct examination of the accused in contravention of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment as to the substance of the very conversation wherein the alleged conspiracies were formed based on concerns that revelation of the details of what actually was discussed would be prejudicial.

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The United States of America

Mark Albert Maloof

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

MARK ALBERT MALOOF,

Petitioner

V.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit in Case No. 98-21114, *United States v. Mark Albert Maloof*, 205 F.3d 819 (5th Cir. 2000), is attached as Appendix A. A copy of the order of the

United States Court of Appeals for the Fifth Circuit denying the Petition for Panel Rehearing is attached as Appendix B.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit on March 2, 2000, entered its opinion affirming the judgment of the District Court. On April 7, 2000, the Court of Appeals denied the Petition for Rehearing *En Banc*.[1] Jurisdiction of the Court of Appeals was invoked pursuant to Title 28, United States Code, Section 1291. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

"No person shall ... be deprived of life, liberty, or property without due process of law...."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...."

---

[1]The Court of Appeals treated "the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing." See Appendix B.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

The petitioner, Mark Albert Maloof, was charged in a two-count indictment with conspiracy to restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371. (R.9 - 1-8). Jury trial commenced on December 1, 1997, before the Hon. Nancy F. Atlas, United States District Judge for the Southern District of Texas, Houston Division, and concluded on December 18, 1997, with verdicts of guilty on both counts. (R.6 - 1138).

On December 1, 1998, the petitioner was sentenced to imprisonment for thirty (30) months under each count, to run concurrently, a fine of $30,847.01, and supervised release for one year under Count 1 (conspiracy to restrain trade), and three years under Count 2 (conspiracy to commit wire fraud), to run concurrently. (R.1 - 2265-2273).

Notice of appeal was timely filed on December 1, 1998. (R.1 - 2250, 2271). On March 2, 2000, the Fifth Circuit affirmed the conviction but vacated and

remanded the case for resentencing.[2] On April 7, 2000, the petitioner's petition for rehearing *en banc* was denied.[3]

STATEMENT OF FACTS

The critical 81-minute telephone conversation of January 3, 1994.

The petitioner was convicted of two counts of conspiracy; the essential element of each charge was an illegal agreement. No single event was more important to the determination of whether Maloof was a member of the price fixing and wire fraud conspiracies alleged in the indictment than the facts surrounding the 81-minute telephone conversation that took place on January 3, 1994, between Maloof and Wally Rhodes, a competitor and the government's star witness. Rhodes, who was permitted to testify at length on direct examination at the government's behest about the hotly disputed conversation, stated that "*as of that moment*" both illegal agreements were allegedly formed. (R.40-59-61, 65-66).

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[2]On remand from the Court of Appeals, the district court re-imposed the identical sentence on June 2, 2000.

[3]See Footnote 1.

(Emphasis added). During the trial, the prosecution repeatedly emphasized the 81-minute telephone conversation as the very event during which the charged conspiracies were entered into. (*See, for example*, R.36-90; R.39-65-66; R.46-320.) In its opening statement, the prosecution stressed "that is where, ladies and gentlemen, we will prove they crossed the line, they agreed on the pricing." (R.8-13-14). In its closing argument, the prosecution asserted that

> when Mr. Maloof called Mr. Rhodes the night of January 3, 1994. ...*[A]t that moment, ladies and gentlemen, Mr. Maloof and Mr. Rhodes had an agreement to fix prices.* The crime was complete even if they didn't do any other thing in furtherance of it....

(R.25-7-8). (Emphasis added).

Rhodes' version and the petitioner's version of the January 3, 1994, telephone call differed in two material respects: Rhodes testified that part of the 81-minute telephone call involved discussion of prices and pricing of metal building insulation ("MBI") (R.40-57, 59); and that an illegal agreement to publish price sheets and to stick to the prices

on the price sheets were reached (R.40-57, 59-61); Maloof contended that the *entire* 81-minute call involved personal matters, particularly Rhodes' complaint that employees of Bay Insulation (the company for which Maloof was employed) in Atlanta told Rhodes' wife (or ex-wife) about Rhodes' numerous mistresses (R.28-66-68; R.44-61-65); and denied that he ever agreed with Rhodes to publish price sheets and to stick to those prices. (R.44-67-68; R.46-345-346). The only witnesses to the disputed conversation were Rhodes and Maloof.

In view of Rhodes' extraordinarily damaging testimony regarding the 81-minute telephone call and the government's theory that both crimes were committed and completed during this admittedly lengthy conversation, defense counsel, early in cross-examination of Rhodes, attempted to lay a foundation to explain what actually transpired in that conversation.

Rhodes was asked whether he was married at that time, and responded, "[h]e was not." (R.28 - 18). Defense counsel then asked when he had gotten divorced, and the prosecutor objected. Before the prosecutor stated a basis for the objection, the district court sustained it, and then sustained a

relevance objection. (R.28 - 19). As defense counsel began a new question, the district court interrupted saying "Wait a minute. If it's on a different topic, you may ask it. If it's on the same topic, don't." (R.28 - 19). Defense counsel requested a side-bar conference, but the district court rejected the request, saying "Skip it. And we'll cover it tonight." (R. 28 - 19).

Rhodes was then questioned about the prosecution's version of the January 3 call. Rhodes admitted that he would be "surprise[d]" to learn that Bay's new price sheet effective January 17, 1994, was being passed out to customers in Texas in December 1993--a month *before* the January 3, 1994 telephone call. (R.28 - 23).

At the end of the day, defense counsel reminded the district court that he needed to revisit the issue. Defense counsel explained that what he

> intended to go into with Mr. Rhodes is that ... on the 81-minute telephone conversation on January the 3rd. ... the purpose of the telephone call was that Mr. Rhodes was highly, highly upset because his wife had found out about his girlfriend in Orlando, Florida;

girlfriend in Fort Walton Beach, Florida; and his girlfriend in South Carolina. And she had found out about it by virtue of an employee's wife, who also worked at Bay, was in Atlanta and the call was to Mr. Maloof raising sand about the employee's telling his wife about his shenanigans when they were out.

(R.28 - 65-66).

The district court requested a proffer from defense counsel on the "relevance" of this evidence. (R.28 - 66).

Defense: Well, the witness has testified that he called, or, that Mr. Maloof called him, I believe, and that they spent 81 minutes talking about prices and allocation.

Court: And they talked about, my notes indicate they talked about price, allocation, and some of this other business with respect to other trade associations, I think, but, in any event, *there was a lot of price discussion.*

Defense: *The evidence that we have is he didn't talk about anything but that.*

Court: So your point is that you want to confront him about the marital situation?

Defense: *I want to confront him about that conversation and what the purpose of it was and what the whole conversation was about.*

Court: What is your factual basis for saying what the "whole conversation" was about? I mean, if they added a different topic in 81 minutes, so what?

Defense: Well, what's before the jury now is his testimony that they talked for 81 minutes about pricing.

. . .

Defense: *The evidence that we have is that--prices weren't even mentioned.*

Court: *Well, I assume you have it from your own client, who is the only other participant of the conversation.*

(R.28 - 67-68). (Emphasis added).

The district court then ruled that defense counsel could not cross-examine Rhodes about the petitioner's explanation of the January 3 telephone conversation:

> My concern is, frankly, that *there is no need for this*. I have a major [Fed. R. Evid.] 403 concern ... the *balancing test* that I need to apply, certainly in this circuit, *goes first and foremost to the probativeness* of the testimony. *Right now I find it highly not probative*. And *I find it highly prejudicial*. So, so far you are losing on both prongs....

(R.28 - 68-69). (Emphasis added).

During direct examination, the petitioner attempted to describe the contents of Rhodes' statements during the crucial 81-minute telephone conversation on January 3, 1994. The trial judge intervened *sua sponte* to prevent the petitioner from discussing the details of this important conversation, limiting him to two-word characterizations, such as "domestic situation" and "personal matters." (R.44 - 62-65).

After the petitioner acknowledged having telephone conversations with Rhodes during January 1994, the direct examination proceeded as follows:

Q: What was the nature of those calls?

. . .

A: Wally [Rhodes] was either getting a divorce or had gotten a divorce and he called me.

Court: *You can be very general. You're discussing his divorce or marital issues, is that what you are going to talk about?*

A: He asked me-

Court: *Wait, wait, stop. I do not want any detail.*

A: He wanted the employees to stop talking about--

. . .

A: His domestic situation.

. . .

Q: Do you recall an 81 minute phone call with Mr. Rhodes?

A: Yes.

Q: Would that have been prior--look on there and see when it is?

. . .

A: Third of January, 1994.

Q: Was that after--how long had the price sheets been out as of January 3rd of 1994, for Bay?

A: A month-and-a-half, two months.

. . .

Q: Did it concern some of the matters you've just testified about, the personal matters?

A: Yes.

. . .

Q: Why did you call Mr. Rhodes at his home?

A: The personal things that he wanted to talk about and the questions about gaining employment with Bay he did not want to talk about at Mizell Brothers, so he had called an employee at Bay and asked the employee to have me give him a call at the house.

(R.44 - 62-63, 65).

As defense counsel continued to examine the petitioner about his telephone conversations with Rhodes in early 1994, the district court summoned counsel to a side bar conference and emphatically restated its prohibition against the petitioner providing details of the discussions which actually occurred during the 81-minute telephone call:

> If [petitioner] starts getting into sensitive matters, such as Rhodes' marital situation, he knows not to say he's heard, he can categorize. *If he starts getting too detailed, I'll cut him off.*

(R.44 - 66). (Emphasis added).

Because the content of the call was the primary factual issue in the case, the defense could not let Rhodes' version of it stand unrebutted. By earlier precluding cross examination of Rhodes regarding "marital infidelities," the district court effectively put the burden entirely on the petitioner to explain to the jury not only *what* was discussed during the 81-minute call, but also *why* the call lasted so long.

The petitioner testified that he remembered the January 3, 1994 call; he explained why he called Rhodes at home, and he stated that prices were not discussed. (R.44 - 67-68). Even the "cold" transcript reveals how the petitioner struggled to describe the details of the call to the jury. Each time he began his explanation, the district court cut him off, instructing him to be "very general" and unequivocally warning, "I do not want any

detail." (R.44 - 62) *See* Record Excerpt 8.

The petitioner was thereby limited to describing the 81-minute telephone call in a code dictated by the district court and not understood by the jury. Further, the court's repeated interruptions of and instructions to the petitioner made his description of the call confusing and disjointed, and telegraphed to the jury the impression that the district court considered the petitioner's testimony regarding this crucial telephone conversation to be improper, if not incredible.

While Maloof was permitted to respond in a *very general* and sterile way to questions about the 81-minute conversation with Rhodes, the district court strictly precluded any testimony from Maloof and any cross-examination of Rhodes about *specific details* concerning the only topics Maloof contended were actually discussed, namely, Rhodes' personal problems surrounding his divorce. (R.44-62; R.28-69-69). The excluded testimony would have provided sufficient detail to convince the jury that the 81-minutes was entirely filled with Rhodes' personal issues and that neither prices nor price-fixing was

discussed at all. Without being permitted to flesh out for the trier-of-fact what actually was stated, the defense's account of the event was stripped of its full force; moreover, Maloof's credibility was irreparably damaged by being denied an adequate opportunity to provide a coherent explanation of the telephone call in sufficient detail that would convincingly justify an 81-minute conversation.

REASONS FOR GRANTING THE WRIT

The panel's conclusion that the district court did not err in disallowing cross-examination of the government's star witness, pursuant to Fed. R. Evid. 403, regarding the specific details of the only topics the petitioner contended were actually discussed in the most crucial conversation in the case, conflicts with *Olden v. Kentucky*, 488 U.S. 227, 232 (1988). Moreover, the panel decision cannot be reconciled with *Davis v. Alaska*, 415 U.S. 308, 317 (1974), which mandates that the trier of fact must be permitted "to have the benefit of the defense theory before them" in order than an informed judgment can be made "as to the weight to place on the witness's testimony which provided `a

crucial link in the proof ... of petitioner's act.'"

ARGUMENT AND AUTHORITIES

The panel decision at least acknowledged that "Rhodes' testimony that he and Maloof agreed to maintain price levels during that conversation was very important to the government's case" and "[e]qually vital to the defense was the persuasiveness of Maloof's testimony that their conversation had nothing to do with prices but focused exclusively on Rhodes' divorce and his desire to be employed by Bay." *Maloof*, 205 F.3d at 828. The panel concluded, however, that the district court did not abuse its discretion in limiting both the cross-examination of Rhodes and the direct examination of Maloof as to the content of the 81-minute telephone call:

> [T]he limitation of Maloof's testimony was reasonably based on the trial court's perceived danger of unfairly prejudicial effects upon the jury by the introduction of irrelevant and scandalous information ... Maloof was allowed to convey that he discussed several topics with Rhodes and that

> their conversation was primarily personal in nature. He was allowed to discuss that Rhodes had gone through a divorce and had called to complain about Bay employees discussing his personal affairs....[Any] additional information about Rhodes' personal problems would not have informed the jury of Rhodes' "considerable incentive to ... slant, unconsciously or otherwise, his testimony in favor of or against a party."

Maloof, 205 F.3d at 828-829. These conclusions are erroneous, as a matter of law.

> ***(a) Once the government elicited testimony regarding the contents of the much disputed conversation, the defense had every right to put the trier of fact into possession of the full details of the same conversation.***

Contrary to the panel decision, Maloof did not attempt to impeach or discredit Rhodes with "irrelevant and scandalous information" about his

personal life. *Maloof*, 205 F.3d at 828. What the defense attempted to do was to confront Rhodes about the content of the very conversation that allegedly spawned criminal conspiracies.

> Speculation as to the effect of jurors' ... biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the prosecution's star witness'] testimony.

Olden v. Kentucky, 488 U.S. 227, 232 (1988). The panel opinion failed to acknowledge, much less address, unambiguous and dispositive law that "clearly, where the content of discussions which actually occurred is a primary issue, a party is entitled to adduce evidence of those discussions at trial." *United States v. Ballis*, 28 F.3d 1399, 1405 (5th Cir. 1994). As the court held in *United States v. McCorkle*, 511 F.2d 477, 479 (7th Cir. 1974),

> [i]t frequently happens that on direct examination of a witness as to a conversation, transaction, or other matter, counsel will bring out only such parts as are favorable to

> the party he represents. *When this occurs, it is the right of the cross-examiner to put the trial court in possession of the full details respecting the matters within the scope of the direct examination,*

quoting, *Banning v. United States*, 130 F.2d 330, 338 (6th Cir. 1942). (Emphasis added). While the district court permitted the prosecution to adduce specific and detailed evidence of the conversation which was very damning in nature, it unfairly prevented the defense from offering testimony that, if believed by the jury, would have served to both counter Rhodes' version of what had been stated and make Maloof's account of the conversation much more plausible.

The veracity of the claim that certain statements were made during the crucial 81-minute telephone call was, like any other evidence, subject to evaluation *by the trier of fact itself:*

> [w]e cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted [the petitioner's] line of reasoning had counsel been

> permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on the witness's testimony which provided "a crucial link in the proof ... of petitioner's act."

Davis v. Alaska, 415 U.S. 308, 317 (1974).

(b) In excluding testimony sought to be elicited by the defense, the district court utilized an incorrect legal standard thereby abusing its discretion.

Not only did the district court and the panel decision err in concluding that discretion existed to apply Fed. R. Evid. 403 to preclude cross-examination of Rhodes about the most critical event in the case, the panel decision countenanced -- by its silence -- the district court's erroneous application of Rule 403 to the testimony in question.[4] "[A]ll probative

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[5]This matter was timely brought to the panel's attention both by written

evidence is by its very nature prejudicial. (Citation omitted). Evidence therefore should be excluded `sparingly' and only in those circumstances where the prejudicial effect substantially outweighs the probative value." *United States v. Powers*, 168 F.3d 741, 749 (5th Cir. 1999). *See also, United States v. Dennis*, 625 F.2d 782, 797 (8th Cir. 1980) ("In weighing the probative value of evidence against the dangers and considerations enumerated in Rule 403, the general rule is that the balance should be struck in favor of admission"); and Wright & Graham, Federal Practice & Procedure: Evidence, § 5221, at 309-310.

> The phrasing of Rule 403 makes it clear that the discretion to exclude does not arise when the balance between the probative worth and the counterveiling factors is debatable; there must be a significant tipping of the scales against the evidentiary worth of the proffered evidence. Thus, the appellate court need not find that the trial judge abused his

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submission and at oral argument. (Reply Brief for Appellant - 17-19).

> discretion; it is enough that he erred in concluding that he had any discretion.

The standard used by the district court to exclude the testimony in question--"under this circuit, I've got to find that ... the undue prejudice is substantially outweighed by probativeness" -- (R.28-68) -- is, of course, the *exact opposite* of the balancing required under Rule 403; *i.e.*, relevant evidence may be excluded only "if its *probative value is substantially outweighed by the danger of unfair prejudice.*" The district court's use of an incorrect legal standard in applying Rule 403 to the excluded evidence is entitled to no deference on appeal.

(c) Maloof was denied an adequate opportunity to fully confront the prosecution's star witness regarding the most important event in the case.

In any event, restrictions on cross-examination in this regard can not be justified under Rule 403:

> [r]elevant evidence is inherently prejudicial; but it is only *unfair* prejudice, substantially outweighing

> probative value, which permits exclusion of relevant matter under Rule 403. *Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing.*

United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979). (Emphasis added). Moreover, discretion does not extend to exclude relevant evidence necessary to establish a defense, *United States v. Riley*, 550 F.2d 233, 236 (5th Cir. 1977), or, which goes to the heart of the case. *United States v. Fisher*, 106 F.3d 622, 633 (5th Cir. 1997). "[T]he importance of and need to safeguard this right (cross-examination) is enhanced when, as here, the witness is crucial to the prosecution." *United States v. Cooks*, 52 F. 3d 101, 104 (5th Cir. 1995). The district court's discretion to control cross-examination, "cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." *Gordon v. United States*, 344

U.S. 414, 423 (1953). It is hornbook law that

> [d]iscretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right, sufficient cross-examination to satisfy the Sixth Amendment.

United States v. Mayer, 556 F.2d 245, 248 (5th Cir. 1977). "In simple language, the defendant has the right to explore *every facet of relevant evidence pertaining to the credibility of those who testify against him.*" *United States v. Partin*, 493 F.2d 750, 753 (5th Cir. 1974). (Emphasis added). The right of confrontation and "cross-examination of adverse witnesses, and the orderly introduction of evidence ... constitutionalizes the right in an adversary criminal trial to make a defense as we know it." *Faretta v. California*, 422 U.S. 806, 818 (1975).

(d) Maloof's right of confrontation was not satisfied merely because he was afforded an opportunity to explore Rhodes' bias and motive.

The panel decision concluded that because Maloof was afforded latitude in exploring the "deal" Rhodes cut with the government for a lenient sentence in exchange for his testimony that "[t]he trial court's limitation into the details of Rhodes' divorce did not implicate the Confrontation Clause", as the jury had sufficient information to "appropriately assess his credibility." *Maloof*, 205 F.3d at 829. The fallacy of this rationale is that cross-examination is not limited to showing only bias or motive. Maloof has never argued that he was prevented from examining Rhodes regarding his arrangement with the government; he was, however, improperly precluded from adducing evidence about the content of the most crucial conversation in the lawsuit that the government was allowed to explore in detail with impunity.

***(e) The panel's conclusion that Maloof was not harmed due to "an abundance of other evidence in the case" fails to focus on Rhodes as a witness, and, as such, can not be squared with* Delaware v. Van Arsdall, 475 U.S. 673 (1986).**

It is axiomatic that in evaluating the improper limitation placed on the defense in its cross-examination of Rhodes, a reviewing court must "consider the record under the assumption that the jury would have disregarded [Rhodes'] testimony" on this issue. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). And where "the role of the government's witness is so crucial to conviction," exclusion of evidence impeaching or discrediting the witness simply can not be harmless beyond a reasonable doubt." *United States v. Davis*, 639 F.2d 239, 245 (5th Cir. Unit B 1981). While the panel decision found "an abundance of other evidence to support the verdict," *Maloof*, 205 F.3d at 829, that determination is clearly erroneous in that the focus is on the *particular witness* in this case, Rhodes, and not on the outcome of the

trial. In *Delaware v. Van Arsdall*, 475 U.S. 673, 679-680 (1986), the Court disabused the prosecution of the notion

> that a defendant should have to show "outcome determinative" prejudice in order to state a violation of the Confrontation Clause.... [T]he focus of the Confrontation Clause is on *individual witnesses*. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the *particular witness*, not on the outcome of the entire trial.... The correct inquiry is whether, assuming that the damaging potential of the cross-examination was fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.

Id. at 679, 680. (Emphasis added). The defendant need not show harm; rather, the government must demonstrate that constitutional error was harmless beyond a reasonable doubt. *United States v. McKinney*, 954 F.2d 471, 475 (7th Cir.

1992) -- a burden the government has never been required to discharge.

(f) The panel's conclusion that the district court did not err in restricting Maloof's testimony about the details of the 81-minute telephone conversation violated Maloof's due process right to put on a defense.

The district court's muzzling of the petitioner, based on its erroneous interpretation of Rule 403, cannot be divorced from its context. Because defense counsel was not permitted to cross-examine Rhodes *at all* about the only topics the petitioner contended were discussed during the 81-minute call, the burden was entirely on the petitioner to present to the jury *for the first time in the trial* a credible version of that crucial telephone call that did not involve *any* discussion of MBI prices or pricing.

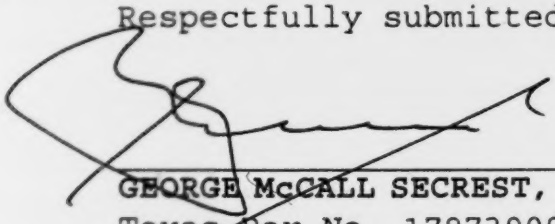
A defendant has a constitutional right "to be heard in his defense - a right to his day in court...." *Rock v. Arkansas*, 483 U.S. 43, 52 (1987). The district court's evidentiary rulings in

the case *sub judice* totally gutted the defense that the petitioner did not enter into an illegal agreement with Rhodes during the crucial January 3, 1994 telephone call. As argued *supra*, "where the content of discussions which actually occurred is a primary issue, a party is entitled to adduce evidence of those discussions at trial." *Ballis*, 28 F.3d at 1405. The district court can not wield Rule 403 as a sword to exclude evidence that "goes to the heart of the case." *Fisher*, 106 F.3d at 633, or to exclude relevant evidence necessary to establish a valid defense. *Riley*, 550 F.2d at 236.

CONCLUSION

For these reasons, the Petitioner respectfully prays that this Court will grant his Petition for a Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

Opinion of
the United States Court of Appeals
for the Fifth Circuit

UNITED STATES of America,
Plaintiff-Appellee

v.

Mark Albert MALOOF,
Defendant-Appellant

No. 98-21114

United States Court of Appeals,
Fifth Circuit

March 2, 2000

Rehearing and Rehearing En Banc Denied
April 7, 2000

Employee of insulation company was convicted of conspiracy to restrain trade in violation of Sherman Act and of conspiracy to commit wire fraud, following jury trial in the United States District Court for the Southern District of Texas, Nancy F. Atlas, J. Employee appealed. The Court of Appeals, Dennis, Circuit Judge, held that: (1) employee was not deterred from adequately presenting "consciousness of innocence" defense; (2) letter from alleged accomplice was not Brady material; (3) guilty pleas of witnesses-accomplices were admissible; (4) District Court did not abuse its discretion in limiting employee's direct testimony so as to prevent him from supplying details

regarding alleged accomplice's marital difficulties; and (5) District Court erred in concluding that three other employees of insulation company were participants in criminal activity, for purposes of Sentencing Guidelines, without first determining that each of them was criminally responsible for commission of an offense.

Affirmed in part, vacated in part, and remanded.

of Texas.

Before JONES, DeMOSS and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

This direct criminal appeal arises from the conviction following jury trial of Mark Albert Maloof (Maloof) for conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and conspiracy to commit wire fraud in violation of 18 U.S.C. § 371. For the reasons assigned, we affirm the convictions, but vacate the sentences, and remand for resentencing.

I. FACTUAL AND PROCEDURAL BACKGROUND

Maloof served as the southern regional sales manager for Bay Industries, Inc. (Bay), a company which produces and sells metal building insulation. Bay opened a Houston office in 1993 and recruited most of Brite Insulation Company's (Brite) sales force as its employees. Bay sharply reduced prices to attract customers, including many of Brite's major customers. Sales representatives from Bay's competitors responded by reducing their prices to generate additional sales.

One of the major components of metal building insulation is fiberglass. In 1993, fiberglass manufacturers doing business in Texas announced a price increase and reduction in the supply of fiberglass insulation. As a result of these changes Daniel Schmidt (Schmidt), Bay's general manager, prepared a price sheet in November 1993 outlining the new pricing scheme for Bay's sales representatives.

On January 3, 1994, Maloof, Bay's regional sales manager, called Wally Rhodes (Rhodes), vice president of sales for Mizell Brothers Company (Mizell), one of Bay's competitors. Rhodes, testifying on behalf of the government, stated that they discussed the effect of the

insulation supply reduction and Rhodes' marital problems. Rhodes said Maloof suggested adopting uniform pricing to ensure that neither company would quote or sell under the other's prices. According to Rhodes, Maloof faxed Bay's price sheet to him. The prosecution introduced telephone records documenting phone calls and faxes between Maloof's phone line and Mizell on a daily basis the following week. Rhodes and Maloof stated that Maloof used the name Tom Coop when he called Rhodes during business hours. Rhodes testified that the purpose of the calls was to revise Mizell's price sheet to conform with Bay's pricing. Maloof stated that each of his conversations with Rhodes concerned only Rhodes' marital problems and that he never faxed or received price sheets from Rhodes.

Other witnesses for the prosecution testified that Maloof was involved in the solicitation of additional competitors to participate in the conspiracy to adopt uniform prices. Rhodes testified that prior to a laminators' trade association meeting in Kansas City on January 11, 1994, he and Maloof agreed to ask representatives of other insulation suppliers to join in the price fixing

agreement. At the meeting, Rhodes said, he discussed the plan to adopt uniform prices with Brite employees, Peter Yueh and Jerry Killingsworth. Rhodes testified that he and Maloof decided that Rhodes should approach the Brite representatives first because of hard feelings and possible litigation resulting from Bay's hiring raid upon Brite's sales force. Killingsworth testified that his agreement for Brite to participate in the price fixing plan was obtained by Rhodes in the presence of Maloof during a smoke break. Rhodes corroborated Killingsworth's testimony. Following this meeting, Rhodes testified, he informed Maloof of Killingsworth's agreement upon Brite's participation and faxed the uniformly adjusted Mizell and Bay price sheets to Killingsworth, who prepared a Brite price sheet that was almost identical. Several weeks later Killingsworth stated that he sent the Bay, Brite and Mizell price sheets to the PBI Supply Company (PBI). Killingsworth testified that PBI faxed him a price sheet that was very similar to those of the other companies. Maloof denied having had any knowledge of the discussion between Rhodes and either Killingsworth or Yueh during the Kansas City meeting.

Fiberglass manufacturers imposed three price increases in 1994 and one in 1995. According to government witnesses, following each increase Maloof shared Bay's price sheet with representatives of Mizell, Bright and PBI. While Maloof denied participating in a conspiracy to adopt uniform prices with any competitor, Rhodes and Killingsworth testified that they agreed upon a pricing scheme with Maloof before distributing new price sheets to their sales representatives. Several Bay employees stated that they complied with Maloof's directive to adhere to Bay's price list because he had little tolerance for deviations. Maloof admitted that he informed Bay sales representatives that they had to adhere to that price list.

In 1994, Bay sales representatives began to receive complaints from some Bay customers that competing sales representatives consistently gave quotes identical to Bay's for 3 inch white vinyl insulation. Bay sales representatives testified that when they relayed the complaints to Maloof, he instructed them to stop selling to those customers.

Janne Smith, who worked for Bay as a division manager under Maloof's supervision, testified that she overheard

Maloof discussing Bay's prices with Rhodes. She said that Maloof faxed Bay's price sheet to Rhodes and informed her that he had to consult Rhodes before approving a customer's request for a discounted price. According to Smith, Maloof gave her a copy of Mizell's price sheet in May 1994 and said that these were the prices Bay would adopt following the next price increase by the manufacturers. Smith also testified that Maloof fired Deloris Hill, a Bay sales representative, for charging prices below the stipulated rates.

Smith stated that because of her observations she suspected Maloof was violating antitrust laws. She testified that in July 1994 she faxed Maloof a document entitled the "Eight Major Fundamentals of Antitrust Law" and discussed her concerns with him. According to Smith, Maloof stated that he could not undo what had already been done. Maloof denied receiving a document on antitrust principles from Smith or discussing it with her.

Several weeks later, Smith reported Maloof's activities to the FBI and agreed to record some of her conversations with him in exchange for immunity. In June 1995, FBI agents and government

prosecutors offered Maloof immunity in exchange for cooperating in the government's antitrust case. Maloof refused the offers. On May 15, 1997, Maloof was indicted on one count of conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371. Maloof was convicted by a jury of both counts and sentenced to 30 months imprisonment on each count, to run concurrently, and fined $30,847. Maloof appealed.

II. DISCUSSION

Maloof assigns several errors on appeal, including the trial court's limitations of his direct testimony and cross-examination of government witnesses, the court's application of a four level sentence enhancement, prosecutorial violations, judicial restriction of his "consciousness of innocence" defense, and the admission of the guilty pleas of witnesses-accomplices as substantive evidence of his guilt. After considering the oral arguments of counsel, the parties' briefs and the record designated for appeal, we conclude that Maloof's argument

concerning his sentences has merit but that his assertions of errors affecting his convictions lack reversible merit.

Maloof's argument that he was deterred from adequately presenting a "consciousness of innocence" defense is unmeritorious. He relies on United States v. Biaggi, 909 F.2d 662, 689-91 (2d Cir.1990), cert. denied, 499 U.S. 904, 111 S.Ct. 1102, 113 L.Ed.2d 213 (1991), in which the court of appeals held that evidence that defendant had rejected an offer of immunity from the government in exchange for testifying as to the wrongdoing of others is relevant and admissible to show defendant's "consciousness of innocence." In Biaggi, the court reasoned that, although plea negotiations are inadmissible against the defendant, see Fed.R.Crim.P. 11(e)(6) and Fed. R. Evid. 410, it does not necessarily follow that the government is entitled to a similar shield, and, more fundamentally, that the two types of negotiations differ markedly in their probative effect when they are sought to be offered against the government. "When a defendant rejects an offer of immunity on the ground that he is unaware of any wrongdoing about which he could testify, his action is probative of a state of

mind devoid of guilty knowledge." Biaggi, 909 F.2d at 690. In Biaggi the court of appeals reversed bribery convictions because the trial court, unlike the district court in the present case, had completely excluded evidence of the defendant's rejection of immunity under circumstances in which that evidence might well have affected the jury verdict. Id. at 692.

Maloof was permitted to testify that he had rejected two government offers of immunity, one by two FBI agents and another by two Department of Justice attorneys, in exchange for taping conversations with his employer and other individuals, explaining to the agents and attorneys that his company could sell all of the insulation it had without price fixing and that he had no knowledge of any price fixing by his company or others. He complains, however, that the trial court erred in (1) instructing the jury to disregard his testimony that the FBI agents had knocked on his door and called out, "Mr. Maloof, this is the FBI, you're going to jail for three years;" and (2) limiting his testimony to the substance of the conversations relating to the offers of immunity, his rejection of the offers and his explanation of lack

of knowledge of wrongdoing, and disallowing his testimony to what he considered to be threats and attempted intimidation of him by the government agents.

[1] We conclude that the trial court correctly applied Fed.R.Evid. 401, 410 and 403 as interpreted in Biaggi by allowing Maloof to testify to the sum and substance of the offers and rejections of immunity; and did not abuse its discretion under Fed.R.Evid. 403 to bar embellishing details on the grounds that their probative value was outweighed by the danger of unfair prejudice, confusion, or delay.

[2][3] Maloof argues that the prosecution violated Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and the Jencks Act, 18 U.S.C. § 3500, by withholding a December 3, 1993 letter written by prosecution witness Killingsworth that directly contradicted his testimony regarding the distribution of Brite's January 1, 1994 price sheets. Under Brady, exculpatory evidence is discoverable by the defendant where it is "material to guilt or punishment." Brady, 373 U.S. at 87, 83 S.Ct. 1194.

Information is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Rosario-Peralta, 175 F.3d 48, 53 (1st Cir.1999) (citation omitted). The Jencks Act requires the government to provide, upon request, any prior statements of government witnesses that relate to the subject matter of their testimony. See 18 U.S.C. § 3500(b). A statement includes a written statement made by the witness and signed or adopted by him. See 18 U.S.C. § 3500(e)(1). To succeed under the Jencks Act, the defendant must demonstrate that he was prejudiced by the failure to disclose. See Rosario-Peralta, 175 F.3d at 53.

Killingsworth testified that at a trade association meeting in Kansas City in January 1994 he agreed to a proposal by Rhodes and Maloof that Killingsworth's company, Brite, join their companies, Mizell and Bay, in an agreement to fix prices and to publish a common or substantially identical price list. Killingsworth said that prior to this agreement there had been no such direct collaboration by the companies in price fixing, although Brite and its

competitors had distributed price lists to customers and had been indirectly influenced in pricing by competitors' price lists or quotes passed on to them by their customers. On cross-examination, Killingsworth identified several Brite price lists dated February 1992, November 1992 and March 1993 that he said had been sent to specific customers. He agreed that the March 1, 1993 price sheet was a "sample of what should be a larger stack" and that he had prepared documents similar to it for manufacturers he either was getting business from or was trying to get business from. In response to further questions on cross-examination, Killingsworth testified:

Q. ... [I]n fact in 1992 and in '93 Brite insulation had put out, in the Houston market area, written, printed price information to various customers?

A. That is true.

* * *

Q. You would not want us to think that your testimony was that for five years prior to 1994 there was no written price information put out in this market by Brite Insulation; that's not correct, is it?

A. Not correct, no, sir.

On cross-examination, Killingsworth identified a Brite price sheet dated January 1, 1994 marked Defendant's exhibit 28 and agreed that it seemed to be a price sheet that he had prepared. On redirect examination, Killingsworth testified that the price sheet marked Defendant's exhibit 28 was not distributed to customers because it was not intended for that use. In the context of his entire testimony it is apparent that he meant that the list was intended for internal company use.

Maloof moved for a new trial on the ground that Killingsworth had presented false testimony in saying the price sheet marked exhibit 28 was not distributed to customers, that the government did not correct this evidence it knew or should have known was false, and that the government had violated Brady by withholding a letter that would have shown that Killingsworth testified falsely. Maloof attached to his motion, as appendix no. 10, a copy of a letter from Killingsworth dated December 3, 1993 to Supreme Insulation in Kansas City regarding "1994 Insulation Prices" stating, inter alia, "Brite Insulation is enclosing our price sheets for North & South Louisiana and Texas attached."

Maloof also contends, without dispute by the government, that a copy of the Brite price sheet marked as Defendant's exhibit 28 was attached to the letter when it was mailed to Supreme Insulation.

Maloof argued in his motion for new trial that Killingsworth's letter, which the government had obtained prior to trial in response to a grand jury subpoena, was not only Brady material but also shows that Killingsworth's testimony was false and that the government let it go uncorrected at trial although it knew or should have known it was false. The government responded that Killingsworth's letter to Supreme Insulation does not effectively impeach his testimony, prove that it was false or that false testimony was knowingly presented by the government. The prosecution points out that when Killingsworth testified about distributing price sheets he made a clear distinction between distributions to competitors and those to customers. Further, the government contends that Supreme Insulation was primarily a competitor of Brite, a co-target in Brite's grand jury investigation, and that Supreme Insulation was not a direct user or consumer of the product, i.e., it was not a metal building manufacturer.

Killingsworth's letter to Supreme Insulation tends to support the conclusion that he was trying to sell to it as a competitor for resale. In the letter he distinguished between one column of prices as "what Brite will charge you for the materials[ ]" and "[t]he other prices ... we suggest be quoted to your customer based on market pricing for this area, but you are free to sell it for what you wish to over the minimum."

The trial court rejected Maloof's arguments in denying his motion for a new trial, concluding, in essence, (1) that he had failed to prove that Killingsworth's testimony was false because the Killingsworth-Supreme Insulation letter did not necessarily contradict his testimony in that he had testified at trial that he had distributed price sheets to special customers prior to January 1, 1994 and that Maloof had not demonstrated that Supreme was a customer rather than a competitor or that it was a buyer in the Texas market; and (2) the court was not persuaded that the letter was truly exculpatory or impeachment evidence or that it was of such a serious nature as to be material under the Brady standard.

[4][5] Maloof presents similar arguments for reversal of his conviction on appeal. We agree with the trial court and the government that Maloof failed to show that Killingsworth's letter to Supreme Insulation contradicted his testimony or that Killingsworth's testimony was false. Consequently, we do not reach the question of whether there was false testimony that could in any reasonable likelihood have affected the judgment of the jury. See United States v. Bagley, 473 U.S. 667, 678-79, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Giglio, 405 U.S. at 154, 92 S.Ct. 763 (quoting Napue v. People of State of Illinois, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)); Kirkpatrick v. Whitley, 992 F.2d 491, 497 (5th Cir.1993). Further, assuming without deciding that the Killingsworth-Supreme letter was evidence that the government was obliged to disclose under Brady, we agree that the evidence was not material under the Brady standard because Maloof has not demonstrated that there is a reasonable probability that, had the evidence been disclosed to the defense, the result would have been different. See Bagley, 473 U.S. at 682-83, 105 S.Ct. 3375.

[6] [7] [8] In addition, we agree that there was no Jencks Act violation. The harmless error doctrine is strictly applied in Jencks Act cases. See United States v. Ramirez, 145 F.3d 345, 357 (5th Cir.), cert. denied, 525 U.S. 1046, 119 S.Ct. 602, 142 L.Ed.2d 543 (1998). A failure to produce Jencks Act material at trial is harmless error where there is no "substantial inconsistency, contradiction or variation" between the prior statements and the witness' trial testimony. See United States v. Keller, 14 F.3d 1051, 1055 (5th Cir.1994) (citation omitted). As previously noted, there was no contradiction between Killingsworth's testimony and his letter to Supreme Insulation. Thus, the fact that the government did not produce the Killingsworth letter does not mandate a new trial. See Ramirez, 145 F.3d at 357 ("the government's failure to comply with the Jencks Act does not per se require a new trial ... if the error was harmless, a new trial would not be required.").

[9] Maloof also argued for a new trial and now contends on appeal that the government's failure to disclose a statement made by Danny Fong to the FBI violated Brady. We conclude, however, that the statement made by Fong to FBI

agents on June 21, 1995 was not Brady material because Maloof's defense counsel had obtained Fong's version of the facts from his attorney. See United States v. Meros, 866 F.2d 1304, 1309 (11th Cir.1989) ("[T]he government is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain for himself." (citation and internal quotations omitted)).

[10] Maloof's witness-accomplice conviction argument is without reversible merit because the district court instructed the jury to consider the guilty pleas of Maloof's accomplices only when weighing the credibility of their testimony. See United States v. Mitchell, 31 F.3d 271, 276-77 (5th Cir.) ("a witness-accomplice's guilty plea may be admitted into evidence if it serves a legitimate purpose and a proper limiting instruction is given."), cert. denied, 513 U.S. 977, 115 S.Ct. 455, 130 L.Ed.2d 363 (1994). The prosecution had a legitimate purpose for introducing the plea agreements because defense counsel advised the court that he intended to rely on the plea agreements to

demonstrate bias and motive. See United States v. Valley, 928 F.2d 130, 133 (5th Cir.1991).

[11] Maloof contends that the district court improperly limited his direct testimony concerning the content of his telephone conversation with Rhodes on January 3, 1994. Rhodes' testimony that he and Maloof agreed to maintain price levels during that conversation was very important to the government's case. Equally vital to the defense was the persuasiveness of Maloof's testimony that their conversation had nothing to do with prices but focused exclusively on Rhodes' divorce and his desire to be employed by Bay. Maloof testified they talked about Rhodes' divorce problems, but the trial court prevented Maloof from relating specific details that Rhodes had disclosed about the nature and source of his marital strife. Maloof argues that his testimony was unfairly deprived of its full force and credibility when the court prevented his complete and detailed recounting of the conversation with Rhodes.

[12] [13] [14] The district court's restrictions on direct-examination are reviewed for abuse of discretion. See United States v. Martinez, 151 F.3d 384,

390 (5th Cir.1998), cert. denied, 525 U.S. 1031, 119 S.Ct. 572, 142 L.Ed.2d 477 (1998). The district court has broad discretion in managing its docket including maintaining the pace of the trial by interrupting counsel or setting time limits. See Sims v. ANR Freight System, Inc., 77 F.3d 846, 849 (5th Cir.1996). Reasonable limits on questioning "based on concerns about ... harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant" are permissible. United States v. Gray, 105 F.3d 956, 964-65 (5th Cir.), cert. denied, 520 U.S. 1246, 117 S.Ct. 1856, 137 L.Ed.2d 1057 (1997) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). We conclude that the limitation of Maloof's testimony was reasonably based on the trial court's perceived danger of unfairly prejudicial effects upon the jury by the introduction of irrelevant and scandalous information. During direct examination, Maloof stated the following:

Q: Did you, during January of 1994, have telephone conversations to and from Mr. Maloof?

A: Mr. Maloof?

Q: I'm sorry, Mr. Rhodes. Thank you, Mr. Maloof.
A: Yes.
Q: What was the nature of those calls?
A: Well, there was several calls. Wally had expressed a dissatisfaction with working at Mizell Brothers and wanted me to ask Dan to get him a job. He had called me to complain about there was some Bay employees who had told some other Bay employees about his--
Opposing Counsel: Your honor, I'm going to object to this.
Court: I'm going to allow it.
Q: Go ahead, Mr. Maloof.
A: Wally was either getting a divorce or had gotten a divorce and he called me.
Court: You can be very general. You've discussed his divorce or marital issues, is that what you are going to talk about?
A: He asked me--
Court: Wait, wait, stop. I do not want any detail.
A: He wanted the employees to stop talking about--
Q: His domestic situation?
A: His domestic situation.
Q: Pardon me for leading, your honor.
Court: That's fine.

Q: When he said he wanted the employees, did he mean the employees of Mizell or Bay?
A: Of Bay.
* * *
Q: There are calls in January of 1994 to Mr. Rhodes' home, are there not?
A: Yes.
Q: Why did you call Mr. Rhodes at his home?
A: The personal things that he wanted to talk about and the questions about gaining employment with Bay he did not want to talk about at Mizell Brothers, so he had called an employee at Bay and asked the employee to have me give him a call at the house.
Q: Of the calls that you had with him in January, how many, how much of the, if you have a judgment, how much of the time that you spoke with him had to do with either the employment or the personal matters?
A: 90 percent.

Maloof conveyed the fact that he discussed several topics with Rhodes and that their conversation was primarily personal in nature. He stated that Rhodes had gone through a divorce and had called him to complain about the fact that Bay employees were discussing his personal

affairs. The district court limited Maloof's direct testimony on the issue of Rhodes' divorce by interrupting him several times. In the district court's judgment, Maloof's testimony of additional details that Rhodes had revealed about his marital controversy would have been unfairly prejudicial and of little probative value to the jury in its assessment of the witnesses' credibility with regard to whether they conspired to fix prices. We conclude that the district court stringently exercised but did not abuse its discretion in limiting Maloof's testimony regarding Rhodes' marital vicissitudes.

[15] [16] [17] Contrary to Maloof's argument, the district court did not abuse its discretion by unduly restricting Maloof's counsel in cross-examining Rhodes. The district court has "wide latitude to impose reasonable limits on cross-examination subject to the Sixth Amendment requirement that sufficient cross-examination be permitted to expose to jurors facts from which they can draw inferences relating to the reliability of witnesses." Martinez, 151 F.3d at 390. The Sixth Amendment is not violated by limitations on cross-examination if the

jury is presented with sufficient information to "appropriately draw inferences relating to the reliability of the witnesses." United States v. Landerman, 109 F.3d 1053, 1061 (5th Cir.), cert. denied, 522 U.S. 1033, 118 S.Ct. 638, 139 L.Ed.2d 616 (1997). The trial court's limitation on cross-examination into the details of Rhodes' divorce did not implicate the Confrontation Clause, as additional information about Rhodes' personal problems would not have informed the jury of Rhodes' "considerable incentive to ... 'slant, unconsciously or otherwise, his testimony in favor of or against a party.' " Id. (internal quotation omitted). On the other hand, Rhodes was questioned extensively on cross-examination about the details of his plea agreement. The jury was informed that Rhodes was facing a sentence of up to three years and the government would recommend a sentence of four months in the event that he cooperated fully. Thus, the Sixth Amendment was not violated because Maloof's cross-examination of Rhodes elicited sufficient evidence with which the jury could appropriately assess Rhodes' credibility.

[18][19] In the absence of any constitutional violation, district court rulings on the length and scope of cross-examination are reviewed for abuse of discretion. Gray, 105 F.3d at 964. In order to obtain relief, the defendant must show that the trial court's restrictions on questioning witnesses were "clearly prejudicial" based on the overall strength of the government's case, the circumstances surrounding the challenged testimony and the importance of that testimony and its corroboration or contradiction at trial. Id. at 965.

[20] Considering all of these relevant factors, the trial court's limitations upon the cross-examination of Rhodes were not prejudicial. Maloof's argument is factually incorrect in asserting that Rhodes testified on direct that their conversation dealt exclusively with establishing a conspiracy to maintain prices. Rhodes in fact testified on both direct and cross-examination that they had discussed both. The trial court excluded cross-examination only as to the elaborate details of Rhodes' personal problems. Thus, after Rhodes answered on cross-examination that he was divorced prior to his January 1994 conversation with Maloof, the court sustained Rhodes'

objection as to a further question seeking the exact date of the divorce because that detail was lacking in probative value. The ruling was not clearly prejudicial because the date of Rhodes' divorce had only a marginal relation to whether he discussed price fixing with Maloof in addition to personal problems. Moreover, there was an abundance of other evidence to support the verdict, including the testimony of Killingsworth and Smith; Maloof's tape recorded conversations with Smith; the records of phone calls among the co-conspirators at crucial times; and the competitors' price sheets reflecting orchestrated price increases.

[21] Maloof challenges the district court's four level sentence enhancement under U.S.S.G. § 3B1.1(a), which provides that the court shall increase a defendant's offense level by four levels if he was "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Section 3B1.1(a) is satisfied if there is proof that the defendant led at least one of the participants in the criminal activity. See United States v. Okoli, 20 F.3d 615, 616 (5th Cir.1994).

Maloof argues that the conspiracy did not involve "five or more participants" and that he was not an organizer or leader. The commentary to § 3B1.1 defines a participant as a person who is criminally responsible for the commission of the offense but who need not have been convicted. U.S.S.G. § 3B1.1, comment. (n.1).

The district court concluded that the involvement of Maloof, Rhodes, Killingsworth and three Bay employees (Janne Smith, Nancy Jensen and Delores Hill) satisfied the five participant requirement. Maloof argues that the district court failed to apply the correct legal standards and clearly erred in its factual findings in determining that each of these individuals was a participant. During the sentencing proceeding the district court stated: "Jane Smith was a participant in the conspiracy for a period of time, at least, insofar as she carried out instructions of the Defendant. Whether she had criminal intent or not is irrelevant." Further, the district court did not otherwise indicate that it had determined that Smith, Jensen or Hill had intentionally or willfully participated in the criminal conspiracy or point to

the evidence in the record that would support such a finding.

[22] We agree with Maloof that the district court erred in concluding that Smith, Jensen and Hill were participants without first determining that each of them was criminally responsible for commission of an offense. "A finding that other persons 'knew what was going on' is not a finding that these persons were criminally responsible for commission of an offense. Willful participation is an essential element of the crime of conspiracy; mere knowledge of a conspiracy does not itself make a person a conspirator." United States v. Mann, 161 F.3d 840, 867 (5th Cir.1998)(citing United States v. D'Angelo, 598 F.2d 1002, 1003 (5th Cir.1979)), cert. denied, 119 S.Ct. 1766 (1999). Consequently, we vacate Maloof's sentences and remand the case to the district court with instructions to clearly articulate the legal and evidentiary bases for the punishment to be imposed and to resentence him accordingly.

[23][24] We find no merit to Maloof's other challenges to the district court's determination that he was an organizer or leader of the conspiracy, including his contention that he did not

exercise control of persons other than Bay employees under his supervision. In determining whether a defendant was an organizer or leader, the court considers such factors as "the defendant's exercise of decision making authority, the nature of the defendant's participation in the commission of the offense, and the degree of control and authority the defendant exercised over others." United States v. Ayala, 47 F.3d 688, 689-90 (5th Cir.1995). The evidence is sufficient to support findings that Maloof initiated the proposal to maintain uniform prices and contacted Rhodes in January 1994 to solicit his agreement; that based upon this conversation, Rhodes agreed to adopt identical prices for Mizell's sales representatives; that Maloof encouraged and directed Rhodes' enlistment of additional conspirators and was actively involved in the operations of the conspiracy, as he regularly exchanged price sheets with his competitors, recommended higher freight charges for customers, monitored Bay sales representatives' adherence to the agreement and informed Rhodes when sales representatives from other companies deviated from the agreed upon pricing; that Smith, Jensen and Hill worked for

Bay under Maloof's supervision; and that Maloof directed Smith to adhere to the price sheet and played a role in Hill's firing when she would not comply with his requests.

III. CONCLUSION

For the reasons assigned, the convictions of the defendant--appellant Maloof are AFFIRMED, but the sentences are VACATED, and the case is REMANDED FOR RESENTENCING in accordance with law and this opinion.

APPENDIX B

Denial of
Petition for Rehearing *En Banc*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-21114

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

MARK ALBERT MALOOF
Defendant - Appellant

Appeal from the
United States District Court
for the Southern District of Texas,
Houston

ON PETITION FOR HEARING EN BANC
(Opinion 3/2/00,
5 Cir., ___, ___ F.3d ___)

Before JONES, DeMOSS AND DENNIS, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc

(FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James Dennis
United States Circuit Judge

(FILED APRIL 7, 2000)